

HARRY ZASLOW

IBLA 79-599

Decided March 27, 1980

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying petition for reinstatement and holding oil and gas lease W 58881 to have terminated.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals --
Oil and Gas Leases: Termination

An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to a lack of reasonable diligence.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

Reasonable diligence requires mailing the rental payment sufficiently in advance of the anniversary date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental in Philadelphia, Pennsylvania, 2 days before it is due in Cheyenne, Wyoming, does not constitute reasonable diligence.

3. Oil and Gas Leases: Rentals

43 CFR 3108.2-1(a) requires the lessee "to pay" the rental on or before the due date.

This regulation contemplates receipt of the remittance by BLM as the date for paying the rental rather than the date of mailing of the payment or the date on which the payment is postmarked.

4. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

In order for the failure to make timely payment of the rental justifiable, the failure must be caused by factors outside the lessee's control which were the proximate cause of the failure. Traveling away from home during the latter part of July when payment is due Aug. 1 will not justify late payment.

APPEARANCES: Jerry Zaslow, Esq., Choen, Pincus, Verlin, Hahn, Reich, and Sherzer, Philadelphia, Pennsylvania, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Harry Zaslow appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated August 22, 1979, denying reinstatement of oil and gas lease W 58881 and holding that lease to have terminated. The lease terminated automatically by operation of law when appellant failed to pay the annual rental on or before the anniversary date of the lease.

The anniversary date of the lease was August 1, 1979. Appellant's check for the rental was dated July 30, 1979. The envelope containing the check was postmarked in Philadelphia, Pennsylvania, on August 2, 1979, and received by BLM in Cheyenne, Wyoming, on August 6, 1979. BLM notified appellant that the lease had terminated for failure to pay the rental in a timely manner.

Appellant petitioned for reinstatement of the lease stating that during the latter part of July he was traveling away from home. He said that upon returning home he immediately mailed the payment on July 30, 1979. He added that late payment by 1 or 2 days does not reflect a lack of diligence.

On August 22, 1979, BLM issued its decision denying reinstatement of the lease because it found that mailing the rental over long distance only 2 days before the due date does not constitute reasonable diligence as required by 43 CFR 3108.2-1(c)(2). BLM also found that traveling away from home during the latter part of July was not a justifiable excuse for failure to pay the rental on or before the anniversary date.

In his statement of reasons, appellant again states that he was traveling away from home in the latter part of July and immediately upon his return prepared a check dated July 30, 1979, and put it in the mail. Appellant says that under the circumstances, it cannot be concluded that he "unreasonably lacked diligence." He contends that even if the envelope was postmarked August 2, 1979, then the payment would be only 2 days late and BLM's determination that this shows lack of reasonable diligence is extreme. Appellant alleges that BLM is unreasonable in imposing the extreme penalty of forfeiture because of a de minimis delay in payment.

[1] An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976); 43 CFR 3108.2-1(a). A terminated lease can be reinstated only if, among other requirements, the lessee shows his failure to pay on time was either justifiable or not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c).

[2] Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). Appellant's rental payment was due on August 1, 1979. The postmark on the envelope is dated August 2, 1979. Mailing the payment after it is due does not constitute reasonable diligence. Gilbert Mark Castillo, 36 IBLA 32 (1978); Apostolos Paliombeis, 30 IBLA 153 (1977). Even if we assume that appellant mailed the check on July 30, 1979, the date on the check, he still would not have exercised reasonable diligence in allowing only 2 days for the payment to reach Cheyenne, Wyoming, from Philadelphia, Pennsylvania. The Board has considered this situation many times and has repeatedly held that mailing the rental 2 days before the due date does not constitute reasonable diligence. Bob W. Scott, 46 IBLA 254 (1980); Norman C. Stroink, 44 IBLA 188 (1980); Reynolds Mining Corp., 39 IBLA 405 (1979); Helen Bacha, 39 IBLA 146 (1979); L. J. Arrieta, 26 IBLA 188 (1976); William N. Cannon, 20 IBLA 361 (1975).

[3] Appellant urges that if the payment was postmarked August 2, 1979, it was, at most, only 2 days late. The critical date for paying the rental is the date on which it is received by BLM, not the date on which it is placed in the mail. Mobil Oil Corp., 35 IBLA 265 (1978). The applicable regulation, 43 CFR 3108.2-1(a), requires the lessee "to pay" the rental on or before the due date. Subsequent language in that section provides that if the time for payment falls upon any day on which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. Such a saving clause would be unnecessary if mailing a remittance postmarked prior to the due date constituted payment. Clearly,

the regulation contemplates receipt of the remittance. Lloyd M. Patterson, 34 IBLA 68, 70-71 (1978). The facts show that payment was due on August 1, 1979, and received by BLM on August 6, 1979, thus making the payment 5 days late.

Appellant contends that the forfeiture is an extreme penalty for the de minimis delay in filing the payment. The penalty in this instance is prescribed by law. The relevant statute, 30 U.S.C. § 188(b) (1976), states that a lease will automatically terminate if the lessee fails to pay the annual rental on or before the anniversary date of the lease. The Board must decide this case in accordance with the law.

[4] Appellant's failure to make timely payment is not justified by the fact that he was traveling away from home during the latter part of July. In order for the failure to pay the rental timely to be justifiable, the failure must be caused by factors outside the lessee's control which were the proximate cause of the failure. Melbourne Concept Profit Sharing Trust, 46 IBLA 87 (1980). Robert H. Schnurbusch, 44 IBLA 229 (1979); Emma Pace, 35 IBLA 143 (1978). A trip, whether for business or pleasure, is not a circumstance ordinarily beyond an individual's control, and it does not ordinarily prevent a diligent individual from making payment or arranging for others to make payment in his absence. Lloyd M. Patterson, *supra* at 71. Hildred W. Bernthal, 30 IBLA 18 (1977); Charles C. Sturdevant, 20 IBLA 280 (1975).

Therefore, as we have determined that appellant did not exercise reasonable diligence in mailing his rental and did not show that failure to make timely payment was justifiable, his petition for reinstatement was properly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge

